No. 80-67

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

ELECTRICAL PRODUCTS DIVISION OF MIDLAND-ROSS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably exercised its remedial authority in imposing a bargaining order on petitioner with respect to one of two separate bargaining units of petitioner's employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-31) is reported at 617 F. 2d 977. The decision and order of the National Labor Relations Board (Pet. App. 32-38) are reported at 239 N.L.R.B. 323.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78) was entered on April 22, 1980. A petition for rehearing was denied on May 27, 1980 (Pet. App. 79). The petition for a writ of certiorari was filed on July 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 81-82. Also relevant is Section 8(a)(1), 29 U.S.C. 158(a)(1), which provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

STATEMENT

Beginning in April 1974, petitioner owned and operated two plants, one located in Tullytown, Pennsylvania (Del-Val), and another located in Morrisville, Pennsylvania (Nylomatic), where it produced plastic products (Pet. App. 39). Pursuant to representation petitions filed by the United Glass and Ceramics Workers of North America, AFL-CIO-CLC (Ceramics Workers) and by the International Union of Tool, Die and Mold Makers, a/w American Craftsmen Association (Toolmakers), the Board conducted representation elections on July 1, 1976,

in two separate units (Unit A and Unit B) of petitioner's Nylomatic employees (*id.* at 40-43).[1] Production and maintenance employees, Unit A, voted on whether or not they wished to be represented by the Ceramics Workers, while the toolroom employees, Unit B, chose between being represented in a separate Unit B by the Toolmakers, by the Ceramics Workers along with Unit A employees, or by neither union (*id.* at 42-43). Just prior to the elections, Nylomatic employees were informed that the Del-Val plant would be closed (*id.* at 46-47). Unit A voted against representation by the Ceramics Workers. Unit B voted for representation by the Toolmakers (*id.* at 48).

Following the filing of objections by the Ceramics Workers and petitioner, the Board set aside both elections (Pet. App. 48-49). Based upon unfair labor practice charges subsequently filed by the Ceramics Workers with respect to Unit A, the Board found that petitioner had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), by refusing to bargain with the Ceramics Workers about its decision to close the Del-Val plant and by bargaining in bad faith about the effects of the closing on unit employees; by timing and implementing the closing of the Del-Val plant with the purpose of chilling union activities at the Nylomatic plant; by impliedly threatening to close the Nylomatic plant if Nylomatic employees selected union representation; and by refusing to recognize and bargain with the Ceramics Workers as the representative of production and maintenance employees at Nylomatic (Pet. App. 73-74).

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[1]At the time, the Ceramics Workers represented Del-Val's production and maintenance employees while the Toolmakers represented Del-Val's toolroom employees (Pet. App. 40).

As a remedy for these unfair labor practices, the Board issued an order requiring, *inter alia*, that petitioner bargain with the Ceramics Workers on request in a production and maintenance unit of Nylomatic employees (Pet. App. 75).[2] The Board found that, due to petitioner's extensive unfair labor practices in this case, a free election could not be held and that the bargaining order remedy requested by the Ceramics Workers was therefore appropriate (Pet. App. 68-69). See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969).

The court of appeals enforced the Board's order in full (Pet. App. 8-31). Rejecting petitioner's challenge to the bargaining order issued by the Board, the court stated (*id.* at 22):

> Moreover, this case has all of the elements that we recently noted to be common where we have held a *Gissel II* order proper. * * * First, the implied threat was communicated to a "significant percentage of employees in the bargaining unit." Both the letter and the meetings involved every employee at Nylomatic. Second, the unfair labor practices involved senior company officials. They controlled the timing of the closing. The operations manager

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[2]The Board's order also required petitioner to cease and desist from the unfair labor practices found; to bargain with the Ceramics Workers on request concerning its decision to close the Del-Val plant and the effects of the closing on Del-Val employees; to make Del-Val employees whole for earnings lost as a result of the discriminatory early closing of the Del-Val plant; to offer unit employees reinstatement to their former or substantially equivalent positions if during bargaining petitioner agrees to resume the Del-Val operation, and, if petitioner does not agree to resume the Del-Val operation, to require it to establish a preferential hiring list for them based on seniority at all of petitioner's plants in existence or later established in the continental United States (Pet. App. 34-35, 75-77). Petitioner does not contest any of these provisions here.

> sent out the June 23 letter and posted the notices, and the June 29 meeting was run by him and the labor management relations manager and the sales manager. Finally, because the finding rests ultimately on a psychological impact on all the employees that is unlikely to dissipate, the factors undermining the first election would be present at any future election.

With respect to petitioner's argument that the Board acted inconsistently in issuing a bargaining order as to Unit A while the Board "permitted" a second election in Unit B, the court explained (Pet. App. 23; footnote omitted):

> Such an argument rests on a misperception of Board practice and rules. Although the mere fact that the union participates in an election and loses will not foreclose it from seeking a bargaining order in a subsequent unfair labor practice proceeding, *see Bernel Foam Products Co.*, 146 N.L.R.B. 1277 (1964), no bargaining order will issue unless the election has been set aside in a representation proceeding. *See Irving Air Chute*, 149 N.L.R.B. 627 (1964), *enforced*, 350 F. 2d 176 (2d Cir. 1965). The theory behind this rule is that the absence of a valid, outstanding election justifies a bargaining order. See *Photobell Co.*, 158 N.L.R.B. 738 (1966).
>
> The crux of *Irving Air Chute* is that the union first must have the election set aside in a representation proceeding and then start an unfair labor practice proceeding to get a bargaining order. Indeed, in the representation proceeding here, the union tried to get a bargaining order. The regional director refused to consider the request, noting that the unfair labor practice proceeding was the proper forum for that claim. Thus, contrary to what the employer claims,

the setting aside of the election in a representation proceeding does not express a view one way or the other as to whether a new election should be held or whether a bargaining order is more appropriate.

Here, the unfair labor practice charges filed by the union relate only to Unit A. At no time has the union asked for a bargaining order in Unit B. The Board did not hold that an election was possible in Unit B but not in Unit A. Instead, it merely set both elections aside in a representation proceeding and the union, for whatever reason, filed unfair labor practice charges relating only to Unit A. Although the Board has some latitude to expand the scope of the charge, it may not reach matters clearly not included in the scope of the complaint nor shown by the evidence at the hearing. * * *

In short, neither the representation proceeding nor the unfair labor practice proceeding involved the appropriateness of a *Gissel II* order in Unit B. Thus the NLRB did not make inconsistent findings because it was never presented with the question of whether a free election could be held in Unit B.

Judge Weis dissented from the enforcement of the bargaining order.

ARGUMENT

Where employer misconduct renders the chances of holding a fair election slight, the Board may issue a bargaining order as a remedy in an unfair labor practice proceeding. *NLRB* v. *Gissel Packing Co., supra,* 395 U.S. at 610-616. Petitioner does not dispute this settled principle nor does it contend that such a judgment could not be made on the basis of the unfair labor practices found to have been committed here. Petitioner does

contend (Pet. 6-7), however, that the fact that the Board allowed a second election to be held with respect to Unit B necessarily establishes that such an election could be held fairly, thus negating the propriety of a *Gissel* bargaining order.

For the reasons stated by the court of appeals (see pages 4-5, *supra*), there is no merit to this contention. No unfair labor practice charges were filed in connection with the Unit B election. The absence of appropriate unfair labor practice charges is a limit on the Board's power to find unfair labor practice violations and to issue remedies. See *NLRB* v. *Local 542, Int'l Union of Operating Engineers*, 329 F. 2d 512, 515 (3d Cir. 1964). Moreover, a *Gissel II* bargaining order, such as was issued here, is appropriate only when the charging union has obtained a majority of valid authorization cards from the unit employees. See Pet. App. 21; *NLRB* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 614. The record does not establish that either the Ceramics Workers or the Toolmakers had a majority of valid authorization cards from the employees in Unit B. Thus, in the absence of valid unfair labor practice charges based on a valid card majority, the Toolmakers could establish entitlement to a bargaining order only by winning a second election. These limitations on the power to seek a bargaining order with respect to Unit B are completely unrelated to the question whether petitioner's unfair labor practices minimize the possibility of holding a fair election. Accordingly, the failure to issue a bargaining order with respect to Unit B is in no way inconsistent with the issuance of the bargaining order with respect to Unit A.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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